

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF OREGON

3 PROJECT VERITAS and PROJECT)
VERITAS ACTION FUND,)

4 Plaintiffs,)

Case No. 3:20-cv-01435-MO

5 v.)

6 MICHAEL SCHMIDT, in his)
7 official capacity as Multnomah)
County District Attorney, and)
8 ELLEN ROSENBLUM, in her)
9 official capacity as Oregon)
Attorney General,)

October 7, 2020

10 Defendants.)

Portland, Oregon

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15 **Oral Argument**

16 (By Videoconference)

17 TRANSCRIPT OF PROCEEDINGS

18 BEFORE THE HONORABLE MICHAEL W. MOSMAN

19 UNITED STATES DISTRICT COURT JUDGE
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APPEARANCES

FOR THE PLAINTIFFS: Mr. Benjamin Barr
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FOR THE DEFENDANTS: Mr. Brian Simmonds Marshall
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Trial Division
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COURT REPORTER: Bonita J. Shumway, CSR, RMR, CRR
United States District Courthouse
1000 S.W. Third Ave., Room 301
Portland, OR 97204
(503) 326-8188

(P R O C E E D I N G S)

(October 7, 2020; 9:08 a.m.)

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THE COURTROOM DEPUTY: The United States District Court for the District of Oregon is now in session, the Honorable Michael Mosman presiding.

Your Honor, this is the time and place set for a preliminary injunction hearing in Case No. 3:20-cv-1435-JR, Project Veritas, et al. versus Schmidt, et al.

Counsel, can you introduce yourself for the record.

MR. BARR: My name is Benjamin Barr on behalf of the Project Veritas plaintiffs.

MR. MARSHALL: Your Honor, this is Brian Marshall on behalf of the state defendants. I am with Ms. Morgan.

THE COURT: Anyone else?

THE COURTROOM DEPUTY: It looks like Mr. Klein is no longer on the video screen.

MR. BARR: Yes, Mr. Stephen Klein is also representing Project Veritas plaintiffs, but I think he temporarily disconnected.

THE COURT: Do you need us to wait for him to be reconnected to begin the hearing or not?

MR. BARR: No, Your Honor. We're fine.

THE COURT: All right. Thank you.

I have several issues here in front of me. I'm going

1 to present generally the issues in the sort of categories or
2 buckets as I see them, and then take them up on the merits.

3 So I think of the case in terms of its statutory
4 analysis as involving three different categories of statutory
5 text. The first is the general ban on what I'll just call
6 secret recordings, non-noticed, non-identified recordings where
7 the recorder is a party to the conversations or events being
8 recorded. And that's a general ban. It has exceptions, but as
9 a general ban -- We just had someone join. Is that you,
10 Mr. Klein?

11 MR. KLEIN: Yes, Your Honor. I'm sorry. I got
12 kicked off the video, but I'll just join by phone.

13 THE COURT: That's fine. Thank you.

14 I'm looking at this case in four categories. The
15 first three involve the statutory text and three sort of issues
16 of statutory text to look at.

17 The first is the general ban on secret recordings.
18 And as a general ban, independent of its exceptions, it appears
19 to me, generally speaking, to be not content based and subject
20 therefore to intermediate scrutiny.

21 The second is the impact that an exception, not on so
22 much the idea of totally secret recordings, but the exception
23 to the notice requirement otherwise generally employed for what
24 I'll call law enforcement encounters. What does that mean?
25 How is that analyzed?

1 The plaintiff here argues that that exception for an
2 otherwise -- the otherwise intact requirement to tell people
3 you're recording them, an exception that requires open, not
4 secret recording but doesn't require this notice feature is
5 content based. And I'm not sure about that. The Ag-Gag case
6 seems to me to be one way to think about it, but there are
7 other cases suggesting sort of some -- some uncertainty as to
8 how one frames the question. Is it framed as a question where
9 there's a topic -- law enforcement, that's the subject of an
10 exception, and others are not, and does that make it content
11 based or not? Of course, if it is content based, then it's
12 subjected to strict scrutiny. If it's not content based, then
13 it's not.

14 Then the third statutory issue is very similar to the
15 second, and that's the other exception for what I'll call open
16 public settings. Still no secret recordings allowed, open
17 recordings allowed, but no identification -- no notice
18 required. And that's also suggested by plaintiffs to be
19 content based. That's a tougher slip for plaintiffs than the
20 law enforcement exception since the text of the statute doesn't
21 seem to raise a particular topic, but I'll, of course, hear the
22 parties out. If that tentative view is correct, then that
23 would be subjected to intermediate scrutiny.

24 The last of the textual issues is this misdemeanor
25 criminalization of innocent publishing. And, quite candidly,

1 if we get that far on a facial challenge, if a facial challenge
2 by this plaintiff is appropriate to that statute, then that
3 seems to run directly afoul of *Bartnicki* and be one that would
4 be unconstitutional to be applied in the textual setting it
5 raises.

6 On the publishers and on other issues, the state
7 raises some challenges to this plaintiff which seem to me to be
8 almost entirely beside the point, since this isn't, as best I
9 have read plaintiffs' briefing, an as-applied challenge but a
10 facial challenge. So those pages of text seem to me to be
11 wasted.

12 The last issue is maybe the most important one --
13 it's certainly the predicate issue here -- and that is is
14 equitable relief available here. And this is emergency
15 equitable relief. There are typically two -- one principal but
16 two reasons why equitable relief wouldn't be available in a
17 setting like this. One is we don't grant this emergency
18 unusual form of relief to plaintiffs who have known of the
19 issue and sat on their hands. And that's, of course, exactly
20 what defendant claims here, that perhaps for even a decade this
21 plaintiff has known of the problems raised for news-gathering
22 organizations in general and its own news-gathering
23 organization in particular, and done nothing about it to
24 challenge it, despite probably many obvious opportunities to do
25 work in Oregon that might run afoul of this statute.

1 So if that turns out to be correct, I think that's
2 fatal to the plaintiff proceeding forward here. We don't grant
3 relief to people who challenge statutes they've known about for
4 a decade.

5 More recently, but still far enough back in time that
6 we probably could have had a trial already by now, plaintiff
7 has engaged in activity in Oregon that appears to at least run
8 the issue of running afoul of the statute. A whole separate
9 issue is raised by the fact that they've never been prosecuted
10 for any of that, but more importantly for my purposes, it
11 highlights the idea that plaintiff may not come to this Court
12 in equity with clean hands seeking equitable relief on an
13 emergency basis.

14 That's not to say it can't seek relief, it can't
15 challenge the statute. Of course it can through normal regular
16 means, but it can't -- a plaintiff can't come into federal
17 court with its hair on fire over an emergency that it's known
18 about for a long time.

19 So I'll start with plaintiff first with that first
20 issue. The briefing suggests you've known about this statute
21 for a long time, acted in Oregon in possible derogation of the
22 statute for a long time, and now on, you know, a few days'
23 notice want to come into court and get emergency relief.

24 Why isn't that barred to you, given your knowledge
25 and past conduct?

1 MR. BARR: Yes, Your Honor. It takes tremendous
2 resources for an organization to marshal a First Amendment
3 challenge in federal court. Project Veritas and Project
4 Veritas Action Fund has taken very apprehensively a few
5 investigations in the past, being aware of the criminal
6 violations applied to reporting news in this state. It has
7 generally wanted to litigate here but hasn't had the funds or
8 the availability to do so, and only as really a truly --
9 Portland becoming an epicenter of national news and dramatic
10 interest about violent protests that it decided that it wanted
11 to make that a priority to be able to get in there, and it
12 didn't want to face the criminal liability that's the parable
13 of the Sword of Damocles hanging over news reporters' heads.
14 The value is not that the sword drops but that it hangs and
15 that at any time a prosecutor can sweep in and penalize the
16 publication of truthful information here.

17 Veritas wants to act on a story of national interest;
18 in particular, the protests that have occurred here. It's also
19 been wanting to follow this story related to the public records
20 advocate. It just had a second advocate resign last week. The
21 story is very hot. And in that sort of instance, under the
22 *Winter* standard in the Ninth Circuit, we analyze the three
23 remaining factors besides the likelihood of success on the
24 merits.

25 THE COURT: Let's not -- let's not get too far afield

1 here. My question isn't whether you're going to win on the
2 merits. My question, first of all, is is it correct that
3 you've known about the statute for a long time and its direct
4 application to your work? The answer to that question seems to
5 be yes, and your explanation for the sort of delay that would
6 otherwise be fatal to your case is you didn't have enough money
7 to file a lawsuit, right?

8 MR. BARR: Yes. The funding is of primary concern,
9 and also simply the rise in prominence about Antifa. It's a
10 story that Project Veritas and Action Fund have been following
11 nationwide. We've submitted DVDs with the verified complaint
12 showing how they worked in other states to track this story
13 that was becoming prime and central in Portland, and decided
14 that this was now becoming a real focal point where they wanted
15 to operate. It wasn't as important before. It became suddenly
16 important to follow up on these stories. They have a First
17 Amendment right to engage in news gathering, and the law
18 forbade it. And so with that sudden change in circumstances,
19 they wanted to move forward.

20 THE COURT: Thank you.

21 For defendants, your response to the equitable
22 argument?

23 MR. MARSHALL: Your Honor, we think that *Benisek* is
24 quite on point to your -- the Supreme Court case where they
25 have -- where the Supreme Court held that six years was too

1 long to seek a preliminary injunction at all, as opposed to not
2 even on an emergency basis.

3 Exhibit 1 on page 74 is the defendant's (sic)
4 testimony. Their CEO said that they contemplated looking at
5 this, at suing on this statute in 2014. And so here we are six
6 years later, not only knowing that they had knowingly violated
7 the statute, recently posted videos that were apparently
8 created in violation -- or recordings that were created in
9 violation of the statute, and have been doing that on an
10 ongoing basis.

11 So I don't know that we have a lot more to add, other
12 than that *Benisek*, combined with Mr. O'Keefe's testimony, does
13 seem to foreclose the availability of a preliminary injunction
14 in this case.

15 THE COURT: Thank you very much.

16 Do you wish to make any reply for plaintiff?

17 MR. BARR: I think my simple response would be that
18 the focus here is on the story and activity, the conduct that
19 Veritas wanted to do. Antifa and its public prominence wasn't
20 a thing ten years ago. That's not what Veritas was focusing
21 on. It knew about the law, but it wasn't as important to move
22 forward. As new stories become prominent and they have unknown
23 geographical impact, that changes it. The Antifa stories are
24 really of the past four years going forward, and most of the
25 early focus there was in Virginia and some states in the south.

1 It's only been recently that Antifa has become a hotbed in
2 Portland, and that is what has pushed them to move forward at
3 this juncture, not ten years ago.

4 Thank you, Your Honor.

5 THE COURT: Thank you.

6 I think this is a classic case of the plaintiff being
7 disentitled to seek equitable relief. The plaintiff has known
8 about this statute and been concerned about the impact of the
9 statute on its business for at least a decade. And it's not
10 been an abstract concern. It has done its business under the
11 umbrella of the statute's coverage quite likely here in Oregon
12 in the past. It's not enough to say that now we're super
13 interested, where before we were just aware. I mean, stories
14 come and go. There's the Antifa story today, but the plaintiff
15 had an interest, an expressed interest by its own CEO in
16 challenging the statute at least six years ago. All of that is
17 far, far beyond the time that would allow someone to come in
18 and seek extraordinary injunctive relief on a preliminary basis
19 in a court of equity.

20 As to the public records advocate, that's not
21 remotely the sort of facts or case that would justify
22 injunctive relief. There's really nothing the plaintiff wants
23 to do in derogation of the statute that it couldn't do after a
24 trial and a victory and accomplish largely the same results.
25 It's not a -- it's not a hot story. There may be new events,

1 but the story is old. And so that one doesn't remotely qualify
2 for injunctive relief.

3 But in any event, it's unusual to have a plaintiff
4 come in interested and aware of the statute, having
5 contemplated suing, by the admission of its own CEO, and seek
6 rapid relief this way. So I deny on equitable grounds the
7 motion for preliminary injunction.

8 That's not to say we don't need to resolve these
9 issues. They are very important issues. And it well may be on
10 one or more of these issues that plaintiff ultimately prevails.
11 I think plaintiff has serious arguments. What it doesn't have
12 is an emergency and is not entitled under its own behavior to
13 injunctive relief.

14 I'll ask the parties to meet and submit a case
15 management schedule for getting this case promptly to trial,
16 through discovery and trial, and then you can outline not only
17 your areas of agreement but your areas of disagreement.

18 Upon receipt of that joint case management proposal
19 -- "joint" meaning just that you both contribute to it, not
20 that you agree on everything -- I will hold a status conference
21 and set further deadlines in this case to reach the point of
22 dispositive motions and trial.

23 Thank you all. Good day.

24 THE COURTROOM DEPUTY: This court is adjourned.

25 (Proceedings concluded at 9:32 a.m.)

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I certify, by signing below, that the foregoing is a correct transcript of the record of proceedings in the above-entitled cause. A transcript without an original signature or conformed signature is not certified.

/s/Bonita J. Shumway

October 14, 2020

BONITA J. SHUMWAY, CSR, RMR, CRR
Official Court Reporter

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MR. BARR: [6]
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<p>V</p> <p>value [1] 8/14</p> <p>Vanessa [1] 2/11</p> <p>verified [1] 9/11</p> <p>VERITAS [11] 1/3 1/3 3/9 3/12 3/19 8/3 8/4 8/17 9/10 10/19 10/20</p> <p>versus [1] 3/9</p> <p>very [5] 5/14 8/4 8/21 10/15 12/9</p> <p>victory [1] 11/24</p> <p>video [2] 3/17 4/12</p> <p>Videoconference [1] 1/16</p> <p>videos [1] 10/7</p> <p>view [1] 5/22</p> <p>violated [1] 10/6</p> <p>violation [2] 10/8 10/9</p> <p>violations [1] 8/6</p> <p>violent [1] 8/10</p> <p>Virginia [1] 10/25</p>	<p>was [5] 9/13 9/14 9/25 10/20 10/25</p> <p>Washington [1] 2/8</p> <p>wasn't [3] 9/15 10/19 10/21</p> <p>wasted [1] 6/11</p> <p>way [2] 5/6 12/6</p> <p>we [11] 4/9 6/1 6/17 7/2 7/6 8/22 9/23 10/5 10/11 11/13 12/8</p> <p>we're [2] 3/23 11/12</p> <p>We've [1] 9/11</p> <p>week [1] 8/20</p> <p>well [1] 12/9</p> <p>were [3] 10/7 10/8 11/13</p> <p>what [8] 4/5 4/23 4/24 5/15 6/20 10/20 11/2 12/11</p> <p>where [6] 4/6 5/8 9/14 9/24 9/25 11/13</p>	<p>Winter [1] 8/22</p> <p>wish [1] 10/16</p> <p>without [1] 13/6</p> <p>work [2] 6/25 9/4</p> <p>worked [1] 9/12</p> <p>would [6] 5/23 6/3 9/5 10/17 11/17 11/21</p> <p>wouldn't [1] 6/16</p>
<p>W</p> <p>wait [1] 3/21</p> <p>want [2] 7/23 8/12</p> <p>wanted [5] 8/7 8/10 9/14 9/19 10/19</p> <p>wanting [1] 8/19</p>	<p>whether [1] 9/1</p> <p>which [1] 6/7</p> <p>who [2] 6/18 7/3</p> <p>whole [1] 7/8</p> <p>why [2] 6/16 7/24</p> <p>will [1] 12/20</p>	<p>Y</p> <p>years [6] 9/25 10/6 10/20 10/24 11/3 11/16</p> <p>yes [5] 3/18 4/11 8/1 9/5 9/8</p> <p>you [17]</p> <p>you're [2] 5/3 9/1</p> <p>you've [2] 7/20 9/3</p> <p>your [15]</p> <p>yourself [1] 3/10</p>